

United States Aluminum Corporation-Northeast and Glaziers, Local Union 252, AFL-CIO, Petitioner. Case 4-RC-17430

November 25, 1991

**SUPPLEMENTAL DECISION AND
DIRECTION**

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered an objection to an determinative challenges in an election held on November 2, 1990, and the hearing officer's Report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 7 against the Petitioner, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and adopts the hearing officer's findings and recommendations as modified.¹

The Employer has excepted to the hearing officer's recommendation that the challenge to the ballot of Stewart Sorrell be sustained. We find merit in this exception because we agree with the Employer that the hearing officer drew the wrong legal conclusion from her factual findings.

The hearing officer correctly found that Sorrell, initially, was jointly employed by the Employer and Western Temporary Services (WTS) from June 25 to August 17, 1990. WTS hired Sorrell, set his wage rate, and issued his paycheck. The Employer set Sorrell's hours of work and breaktimes, assigned his work, and directly supervised him. Sorrell worked in the Employer's shipping and receiving department.

The hearing officer further found that in July 1990, Sorrell agreed to work permanently and exclusively for the Employer once he had been on the WTS' payroll for 8 weeks. (If the Employer had hired Sorrell prior to 8 weeks' employment, the Employer would have been required to pay WTS a finder's fee.) Due to a downturn in business, Sorrell was laid off on August 17, 1990, with (in the words of the hearing officer) "a reasonable expectation of being recalled" to work. Sorrell was on layoff status during the payroll eligibility period, which ended on September 9, 1990. The election was conducted on November 2, 1990.

The hearing officer concluded that at the time of his layoff, Sorrell was a "temporary employee who did

not share a community of interest" with the unit employees. The hearing officer therefore recommended that the challenge to Sorrell's ballot be sustained on the grounds that he was not "employed" in the unit prior to the voting eligibility date. We disagree.

Contrary to the hearing officer, we conclude that Sorrell was not a temporary employee at the time of his layoff. Under Board and court precedent, an employee is ineligible to vote as a "temporary employee" only if a definite termination date has been established. *NLRB v. New England Lithographic Co.*, 589 F.2d 29, 33-34 (1st Cir. 1978). Sorrell was plainly not a temporary employee under this definition because his tenure of employment was not limited.² In addition, the record establishes that Sorrell shared a community of interest with the Employer's other production and maintenance employees. Although Sorrell did not receive the same rate of pay or benefits as the unit employees and did not punch a time clock, he worked alongside the other production and maintenance employees performing the same type of work during the same hours, took the same breaks, was subject to the same rules, and was supervised by the same supervisors. Further, Sorrell's excepted recall was to a permanent position with the same terms and conditions of employment as the unit employees. Accordingly, we find that Sorrell, an employee with a reasonable expectation of recall to a permanent position with the Employer, shared a community of interest with the unit employees. Therefore, Sorrell was eligible to vote in the election and we overrule the challenge to his ballots.³

Having overruled the challenges to the three determinative ballots, we shall direct that the ballots of Stewart Sorrell, Ted McCollum, and Gloria Trumbull be opened and counted and that a revised tally of ballots be issued.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall within 14 days from the date of this Supplemental Decision and Direction, open and count the ballots of Ted McCollum, Stewart Sorrell, and Gloria Trumbull. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

¹In the absence of exceptions we adopt, pro forma, the hearing officer's recommendations that the Petitioner's objection be overruled and that the challenges to the ballots of Ted McCollum and Gloria Trumbull also be overruled.

²The hearing officer's reliance on *State County Employees AFSCME*, 224 NLRB 1057, 1058 (1976), is misplaced. The employee at issue in that case was employed for a 90-day period as a "special project employee" and specifically had been denied regular, full-time employee status. In this case, Sorrell's employee status contained no such limitations.

³See *United States Aviax Co.*, 279 NLRB 826, 843-844 (1986).